Supreme Court, U.S.
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No. 99-1951

IN THE

Supreme Court of the United States

SANDRA BROWN, *et al.*,

Petitioners,

v.

PAYDAY CHECK ADVANCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LIGHTHOUSE FINANCIAL GROUP OF ILLINOIS, INC. AND ANDREW J. MAY

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Lighthouse Financial Group of Illinois, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioners have submitted a Statement of the Case only for the appeals from *Brown, et al. v. Payday Check Advance, Inc., et al.* and *Laws v. Payday Loan Corp.*, claiming that "[t]he statement of the case of all of the cases [for which Petitions have been filed] are similar." (Petition at 4 n.1). Lighthouse Financial Group of Illinois, Inc. ("Lighthouse"), a financial institution specializing in short-term loans, and Andrew J. May ("May"), Lighthouse's President, are Respondents in the Petition filed by Petitioner David Shabas ("Shabas") in *Shabas v. Lighthouse Financial Group of Illinois, Inc., et al.* ("*Shabas*"). Lighthouse and May disagree with Petitioners' assertion that "all of the cases are similar." Petitioners' Statement of the Case contains numerous inaccuracies with respect to *Shabas*. Lighthouse and May provide an accurate Statement of the Case for *Shabas* below.

Shabas filed a Complaint in three counts in connection with a short-term loan he received from Defendant Lighthouse. In a loan disclosure form provided to Shabas, Lighthouse disclosed the cost of credit for the loan expressed as a monthly percentage rate, as well as an annual percentage rate. In Count I of the Complaint, Shabas alleged that by disclosing the cost of credit as a monthly percentage rate as conspicuously as the disclosure of the cost of credit as an annual percentage rate, Lighthouse and May violated the "conspicuous" disclosure requirements of Section 1638 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* TILA requires that certain disclosures mandated by TILA be conspicuously segregated from disclosures not required by TILA and that the terms "finance charge" and "annual percentage rate" be disclosed more conspicuously than any other terms, except the identity of the creditor.

15 U.S.C. §§ 1638(b)(1), 1632(a). (Petition at N1-N2). In his Complaint, Shabas also made a vague claim that Lighthouse and May misled him in connection with the disclosure of a security interest in Shabas' vehicle. In Counts II and III of the Complaint, Shabas purported to state Illinois law causes of action for interest rate "unconscionability" and under Illinois' Consumer Fraud Act, based upon the district court's supplemental jurisdiction.

Lighthouse and May moved to dismiss Shabas' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As to Count I, Lighthouse and May argued that Lighthouse complied with TILA, but even if Shabas could establish a technical violation of TILA's conspicuous disclosure requirements contained in TILA's Section 1638(b), Shabas' claim still failed due to an absence of recoverable damages. Shabas did not allege in his Complaint that he suffered any actual damages as a result of the alleged technical TILA violations, and, Lighthouse and May argued, Section 1640(a) of TILA prohibits a plaintiff from recovering statutory damages for alleged violations of TILA's conspicuous disclosure or segregation requirements. As to Counts II and III, Lighthouse and May argued that the court should decline to exercise its supplemental jurisdiction over Shabas' state law claims, which involved matters of state policy, namely, permissible interest rates on short-term loans.

The district court granted Lighthouse's and May's Motion to Dismiss. (Petition at G1-G7). The district court found that Lighthouse's disclosures to Shabas complied with TILA as a matter of law and were accurate. (Petition at G2-G4). Having dismissed Shabas' TILA claims, the district court declined to exercise supplemental jurisdiction over

Shabas' pendent state law claims, and it entered judgment in favor of Lighthouse and May and against Shabas. (Petition at G7).

Shabas moved for reconsideration of the district court's dismissal of his claims. The district court denied Shabas' motion for reconsideration. (Petition at H1-H3). While concluding upon reconsideration that it could not decide as a matter of law that Lighthouse's disclosures complied with TILA, the district court held that Shabas' claims should be dismissed, finding that Section 1640(a) of TILA does not allow a plaintiff to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements. (Petition at H2-H3). Contrary to Shabas' claim in the Petition (Petition at 15), the district court did not specifically focus on Section 1632(a) of TILA for the statute's conspicuous disclosure requirements, as Shabas did not specifically claim a violation of Section 1632(a) in his Complaint and did not even mention this provision of TILA before the district court until he filed his motion for reconsideration.

Shabas appealed the district court's judgment in favor of Lighthouse and May to the Court of Appeals for the Seventh Circuit. But before briefing had commenced on Shabas' appeal, the Court of Appeals decided *Brown, et al. v. Payday Check Advance, Inc., et al.*, 202 F.3d 987 (7th Cir. 2000) ("*Brown*"). (Petition at A1-A9). In *Brown*, the Court of Appeals held that TILA did not provide for recovery of statutory damages for alleged violations of the conspicuous disclosure requirements contained in Section 1638(b) of TILA. (Petition at A1-A9). The Court of Appeals had previously decided two other cases involving TILA, *Hahn v. McKenzie Check Advance of Illinois, LLC*, No. 99-3346, (7th Cir. Feb. 2, 2000), and *Smith v. Cash Store Management,*

Inc., 195 F.3d 325 (7th Cir. 1999). On the authority of these decisions, the Court of Appeals issued an Order affirming the district court's judgment in favor of Lighthouse and May and against Shabas. (Petition at B1).

Shabas petitioned the Court of Appeals for a rehearing and a rehearing *en banc*. The Court of Appeals issued an Order denying Shabas' petition.

REASONS FOR DENYING THE WRIT

There are several reasons to deny the Petition. First, the only federal question involved in this case, whether the plain language of TILA authorizes a plaintiff to recover statutory damages for certain limited technical violations of TILA, does not present an important question of federal law. Second, the Court of Appeals' holding that a plaintiff is not entitled to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements is consistent with both the plain text and legislative history of TILA. Finally, there is no conflict among the decisions of the Courts of Appeals, as the Seventh Circuit is the only Court of Appeals to have actually addressed the portion of Section 1640(a) of TILA at issue in this case.

I.

THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

This Court should deny the Petition because this case does not present an important question of federal law. The only federal question presented by this case is whether, under the plain language of TILA, a plaintiff who has not suffered

actual damages is entitled to recover statutory damages for certain alleged technical violations of the statute. This question does not involve an area of significant consumer concern under federal law.

First, this case does not present an issue involving any real harm to consumers. Shabas (apparently like all of the Petitioners) did not allege in his Complaint that he suffered any actual damages as the result of the alleged TILA violations by Lighthouse and May. To recover actual damages under TILA, Shabas had to plead and prove: 1) that he read the TILA disclosure statement; 2) that he understood the charges being disclosed; 3) that had the disclosure statement been accurate, he would have sought alternative financing; and 4) that he would have found, and been qualified to obtain, an alternative loan with better terms. *Adiel v. Chase Fed. Sav. & Loan Ass'n*, 630 F. Supp. 131, 133 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987); *Romaker v. Crossland Mortgage*, 1996 WL 254299 at *2 (N.D. Ill., May 10, 1996) (Grady, J.). Shabas did not allege any of these elements in his Complaint. (Petition at 6).

Shabas' failure to allege in his Complaint that he suffered any actual damages as a result of the alleged TILA violations is not surprising given the technical nature of the alleged violations at issue in this case. Lighthouse provided a loan disclosure form to Shabas that was accurate in all respects. But according to Shabas, Lighthouse violated TILA because in addition to disclosing the finance charge and the cost of credit as an annual percentage rate, it disclosed the cost of credit as a monthly percentage rate, and it did so in a manner that made the disclosure of the monthly percentage rate as conspicuous as the disclosures of the finance charge and annual percentage rate.

The technical violation of TILA alleged by Shabas does not present a serious threat of harm to consumers. Shabas received a short-term loan from Lighthouse, with repayment of the principal due eight months from the date of funding of the loan. Shabas was required to pay interest on a monthly basis during the term of the loan and was entitled to pay off the loan early. For a customer obtaining a short-term loan issued by Lighthouse, the expression of the cost of the loan as a monthly percentage rate is relevant. Thus, to enable its customers to best understand the terms of a loan, Lighthouse disclosed the monthly percentage rate prominently in its loan disclosure forms. If in doing so Lighthouse committed a technical violation of TILA's conspicuous disclosure requirements, as Shabas alleged, the violation was harmless.

Although Shabas spends much of the Petition discussing the background and purpose of TILA (Petition at 8-12), Shabas does not and cannot argue that Congress intended for TILA to clog the federal courts with opportunistic lawsuits based on technical violations of the statute. Indeed, as the Seventh Circuit pointed out below (Petition at A7-A8), Congress acted to restrict the availability of statutory damages for certain technical violations of TILA when it amended Section 1640(a) of TILA in 1980. *See* S. Rep. No. 368, 96th Cong., 1st Sess. 17, reprinted in (1980) U.S. Code Cong. and Ad. News 236, 239.

As Shabas recognizes, TILA was intended to address serious affronts to consumer welfare. There is no serious threat of harm posed by type of disclosures made by Lighthouse to Shabas. Shabas' attempt to distract the Court with hypothetical disclosures that Shabas claims could result if plaintiffs are denied recovery of statutory damages for certain technical violations of TILA (Petition at 12-20) is

similarly unavailing. The only disclosures before the Court in *Shabas* are the disclosures made by Lighthouse. Those disclosures were accurate and were not misleading.

Second, to the extent that Shabas continues to challenge the lower court's refusal to exercise supplemental jurisdiction over his pendent state law claims, this case does not present an issue of federal law. "[T]he general rule is that, when all federal claims are dismissed before trial, [a] district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Kennedy v. Schoenberg, Fisher & Newman*, 140 F.3d 716, 727 (7th Cir.), *cert. denied*, 119 S. Ct. 167 (1998). That rule is fully applicable here, where interest rates for small loans are governed by an Illinois statute, the Illinois Consumer Installment Loan Act, 205 ILCS 670/1 *et seq.*, which contains no cap on interest rates and instead provides that a lender "may charge, contract for and receive thereon interest at a rate agreed upon by the licensee and the borrower . . ." 205 ILCS 670/15(a).

Moreover, the subject of short-term loans is currently being debated in the Illinois legislature, where several recently-introduced bills propose additional regulations to supplement the current Illinois regulatory framework under the Consumer Installment Loan Act and require the Illinois Department of Financial Institutions to perform a comprehensive study of the short-term loan industry. *See, e.g.*, Illinois House Bill No. 2189, Illinois Senate Bills Nos. 358, 446 and 842. To the extent that this case presents important consumer issues relating to the short-term loan industry, those issues are the subject of legislative action at the state level and do not involve an area of significant federal concern.

II.

THE LOWER COURTS' HOLDINGS ARE CONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF TILA.

The lower courts' holdings that Shabas is not entitled to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements were based on the plain language and legislative history of TILA. Because this case involves the lower courts' straightforward and correct application of principles of statutory interpretation and legislative history, this Court should deny the Petition.

In the sole Count of his Complaint that invoked federal law, Shabas claimed that Lighthouse and May violated the conspicuous disclosure requirements of Section 1638(b) of TILA. The lower courts based their decision that Shabas was not entitled to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements on the damages-limiting provision of Section 1640 of TILA. Although subsection 1640(a)(2) contains an "apparently liberal grant of statutory damages," this grant "is then limited by the contents of an unnumbered paragraph following subsection 1640(a)(4)." *Galloway v. Long Beach Mortgage*, 220 B.R. 236, 245 (E.D. Pa. 1998). This provision restricting the availability of statutory damages under TILA states in relevant part:

> In connection with the disclosures referred to in section 1638 of this title, *a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as*

> *it requires a disclosure of the 'amount financed'), (3), (4), (5), (6), or (9) of section 1638(a) of this title*, or for failing to comply with disclosure requirements under State law for any term which the [Federal Reserve] Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title.

15 U.S.C. § 1640(a) (emphasis supplied).

In *Brown*, the Seventh Circuit, applying this plain statutory language, ruled that where the plaintiffs alleged violations of TILA's Sections 1632(a), 1638(a)(8), and 1638(b), the damages-limiting provision in Section 1640(a) prevented the plaintiffs from recovering statutory damages under TILA. (Petition at A1-A9). The Seventh Circuit reasoned that Section 1632(a), which requires emphasis of the typeface of the terms "finance charge" and "annual percentage rate," works "in connection with" the conspicuous disclosure requirements of 1638(b), and thus comes within the ambit of the damages-limiting provision in Section 1640(a). (Petition at A4-A9). Because Sections 1632(a), 1638(a)(8), and 1638(b) do not appear on the list of violations eligible for statutory damages under Section 1640(a), the plaintiffs were not entitled to recover statutory damages. (Petition at A1-A9).

In addition to applying the plain language of TILA's Section 1640(a), the Seventh Circuit in *Brown* also looked to the legislative history of this provision. (Petition at A7-A9). The restriction on the availability of statutory damages contained in the unnumbered paragraph after

Section 1640(a)(4) was enacted by Congress as part of the Truth-In-Lending Simplification and Reform Act of 1980. Pub. L. No. 96-221, tit. VI, 94 Stat. 132, 168 (1980). The legislative history of this enactment revealed that Congress intended to restrict the availability of statutory damages for certain technical violations of TILA:

> This section is intended to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping. The committee believes this will eliminate litigation based on purely technical violations of the act. Civil liability for actual damages and administrative liability would continue to attach to all the act's requirements.
>
> In closed-end credit, a statutory penalty of $100 to $1,000 would attach only to rescission requirements and disclosure of the amount financed, finance charge, annual percentage rate, total of payments, number, amount, and due dates of payments, and the security interest statement. Thus, the creditor will not be subject to a statutory penalty for more technical requirements.

S. Rep. No. 368, 96th Cong., 1st Sess. 17, reprinted in (1980) U.S. Code Cong. and Ad. News 236, 267.

Shabas is incorrect in his assertion that denying recovery of statutory damages for alleged violations of TILA's conspicuous disclosure requirements renders Sections 1632(a) and 1638(b)(1) of TILA "superfluous." (Petition at 23). A plaintiff suing under TILA may still recover actual

damages suffered as a result of violations of TILA's conspicuous disclosure requirements. By allowing a plaintiff to recover actual damages but not statutory damages based on violations of these TILA requirements, Congress has focused the damages provisions of TILA on violations that actually cause consumers serious harm.

Based on the plain language of TILA's Section 1640(a), which does not include violations of TILA's conspicuous disclosure requirements among the violations for which a plaintiff may recover statutory damages, and TILA's legislative history, which reveals the intention of Congress to limit creditor liability for certain technical violations of TILA, the lower courts properly dismissed Shabas' TILA claims. The lower courts' straightforward application of the plain language and legislative history of TILA was correct, and there is no compelling reason for this Court to review the lower courts' dismissal of Shabas' TILA claims.

III.

THE COURTS OF APPEALS ARE NOT IN CONFLICT.

Contrary to Shabas' claims, the lower courts' holdings in the cases at issue in this Petition that a plaintiff is not entitled to recover statutory damages for violations of TILA's conspicuous disclosure requirements do not conflict with any other Court of Appeals decisions. The Seventh Circuit is the only Court of Appeals that has actually addressed the scope of the damages-limiting provision following Section 1640(a)(4) of TILA.

Shabas claims that the Seventh Circuit's decision in *Brown* conflicts with an opinion from the Court of Appeals for the Tenth Circuit, *Herrera v. First Northern S. & L. Ass'n*, 805 F.2d 896, 901 (10th Cir. 1986). (Petition at 26). There is no conflict between *Brown* and *Herrera*. In *Herrera*, the Tenth Circuit ruled that the "*bona fide* error" exception to statutory damages under Section 1640(c) of TILA did not apply under the facts at issue in that case, where the creditor failed to comply with TILA's conspicuous disclosure requirements. *Id.* at 899. The Tenth Circuit reasoned that the creditor's failure to comply with the conspicuous disclosure requirements was not a clerical, mathematical, printing, or computer error, which are the only types of errors excusable under the plain language of Section 1640(c). *Id.* at 900-01. No argument was raised by the defendant in *Herrera* that statutory damages were simply unavailable in connection with a violation of TILA's conspicuous disclosure requirements.

Herrera and *Brown* address different subsections of TILA. While *Herrera* addressed the "*bona fide* error" exception to statutory damages under Section 1640(c), *Brown* addressed the statutory damages-limiting provision for certain technical violations of TILA located at the unnumbered paragraph after Section 1640(a)(4). Thus, there is no conflict between these two cases. To the contrary, *Herrera* and *Brown* are in harmony with each other, as each applied the plain statutory language of TILA to reach a correct result.

Other than the *Herrera* case, Shabas does not contend that any decision of another Court of Appeals conflicts with the Seventh Circuit's holding in *Brown* or its reasoning with respect to the statutory damages limitation of Section 1640(a)

of TILA. The Courts of Appeals are not in conflict today. The Seventh Circuit is the only Court of Appeals to date that has addressed the damages-limiting provision in Section 1640(a) of TILA. The early stage of development of lower court decisions actually addressing the question of the scope of the damages limiting provisions of 1640(a) provides yet another reason to deny the Petition.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, Respondents Lighthouse Financial Group of Illinois, Inc. and Andrew J. May respectfully request that this Honorable Court deny the Petition filed by David Shabas.

Respectfully submitted,

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